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No. 99-1434

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

THE MEAD CORPORATION,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

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BRIEF *AMICUS CURIAE* OF THE AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS IN SUPPORT OF RESPONDENT

PETER BUCK FELLER
Counsel of Record
DANIEL G. JARCHO
MICHAEL J. HAUNGS
MYRON PAUL BARLOW
McKENNA & CUNEO, L.L.P.
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500

Counsel for Amicus Curiae The American Association of Exporters and Importers

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QUESTIONS PRESENTED

1. Whether classification rulings issued by the Customs Service are entitled to deference in determining the proper tariff classification of imported goods.

2. Whether the Customs Service reasonably interpreted the statutory phrase "diaries, notebooks and address books, bound" in Subheading 4820.10.20 of the Harmonized Tariff Schedules of the United States to include the spiral-bound and ring-bound planners imported by Respondent.

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INTEREST OF *AMICUS CURIAE*

The American Association of Exporters and Importers ("AAEI") is a national association of over 1,000 U.S. firms that are involved in importing products into, and exporting products from, the United States.[1] AAEI's member companies export, import, distribute and manufacture a broad spectrum of products, including chemicals, electronics, machinery, footwear, automobiles and parts, food, household consumer goods, toys, specialty items, textiles and apparel. In addition, many organizations serving the international trade community—customs brokers, freight forwarders, banks, attorneys, insurance firms and carriers—are active members of AAEI.

Since its founding in 1921, AAEI has played a strategic role in monitoring and reviewing U.S. Customs regulations and compliance initiatives, such as account management, self-governance, compliance assessment reviews, outbound enforcement, duty drawback, and reconciliation. AAEI is often called upon by Congressional committees to offer its technical expertise on policy and regulatory matters causing impact on global commerce. AAEI has participated as an *amicus curiae* in a number of cases involving issues of interest to its members in this Court, the U.S. Court of Appeals

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1 Pursuant to Supreme Court Rule 37.6, *amicus curiae* affirms that no counsel for either party authored any part of this brief and that no one other than *amicus curiae* provided any financial support for the preparation of this brief.

Pursuant to Supreme Court Rule 37.2, written consent to the filing of this brief has been obtained from counsel for petitioners and respondents, and the documents reflecting consent have been filed with the Clerk's office.

for the Federal Circuit, and the U.S. Court of International Trade.[2]

AAEI and its member companies are interested in the proper administration of the customs laws and in preserving meaningful judicial review of customs decisions. This case is significant for AAEI because it raises the question of the degree of deference accorded the decisions of the Customs Service, an issue of central importance to those who interact with Customs.

As the only national association specifically representing U.S. corporations involved in both importing and exporting, AAEI is well-suited to articulate the interests of the trade community in this case, and to provide the Court with a broad perspective on customs law and the consequences of giving deference to Customs Service decisions.

STATEMENT OF THE CASE

This case arises in an unique legal context, steeped in over two centuries of legal tradition: the classification of goods by the United States Customs Service. The issue in this case—the scope of deference due the case-specific, fact-specific decisions of the Customs Service classifying particular goods imported into the United States—may potentially be of broad significance to other administrative agencies. But to understand this case, it is necessary to begin with an understanding of the nature of customs law, the types of decisions made by the Customs Service, and the specialized nature of judicial review in this context.

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[2] *See, e.g., Vimar Seguros y Reaseguros, S. A. v. M/V Sky Reefer*, 515 U.S. 528, 530 (1995); *Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 576 (1986).

A. The Customs Service

Established in 1789 by the fifth act of the First Congress, which was signed into law by President George Washington, the Customs Service is one of the oldest federal agencies, predating by some 150 years the rise of the modern administrative state.[3]

Although the Customs Service has come to perform a number of other duties relating to import and export transactions, its primary mission has always been to collect taxes on goods imported into the United States. Indeed, Customs proudly reminds us that for nearly the first 125 years of the Nation's existence, customs revenues funded virtually the entire federal government.[4] Consistent with its tax-collecting function, the Customs Service defines its mission as "*Protect the Revenue.*"[5]

B. Judicial Review By Specialized Courts

Judicial review of Customs decisions also dates to the earliest days of the Republic. Although the Nation's first

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[3] *See* Act of July 31, 1789, ch.5, 1 Stat. 29 (establishing ports of entry and the office of customs collector).

[4] *See U.S. Customs History* <http://www.customs.gov/about/about.htm> ("Customs collections built the nation's lighthouses; the U.S. military and naval academies; the City of Washington; and, the list goes on."); *see also* Patrick C. Reed, *The Role of Federal Courts in U.S. Customs and International Trade Law* 9 (1997) ("[C]ustoms duties represented the largest source of federal revenue until the adoption of income taxes after the Sixteenth Amendment to the Constitution in 1913.").

[5] *E.g., U.S. Customs History* <http://www.customs.gov/about/about.htm> ("The Service collects and protects the revenue…"); *see also* 64 Fed. Reg. 13,371 (1999) ("Customs has the duty and responsibility to exercise sufficient control and to protect the revenue from any unlawful introduction of merchandise into the commerce of the country.").

tariff statutes contained no explicit mechanism for challenging duty assessments, a dissatisfied importer could nevertheless bring suit at common law against the customs collector personally.[6] Such actions initially had to be brought in state courts until Congress established the first federal removal jurisdiction for suits brought against customs officers.[7] From the outset, the courts made their own determinations as to the meaning of the tariff provisions, with no particular deference to the views of the customs officials.[8]

The volume of tariff refund suits grew enormously throughout the later nineteenth century, particularly in New York, which was by far the largest port of entry.[9] Conflicts developed in the customs decisions of different federal courts, and the complex factual and legal issues were difficult for non-specialist judges and juries.[10] In 1890, in response to the need for uniformity and expertise, Congress created a specialized tribunal, the Board of General Appraisers, to review Customs' decisions.[11] The Board's decisions were initially reviewed by federal courts of general jurisdiction; however, continuing overcrowding, conflicts between circuits, and the technical and specialized nature of customs law led Congress to create the United States Court of Customs Appeals in 1909, with exclusive jurisdiction to review final decisions of the Board of General Appraisers.[12]

The names of the specialized courts reviewing customs decisions have changed several times over the years.[13] In 1980, Congress gave the trial court hearing customs matters its present name, the United States Court of International Trade, and further expanded its jurisdiction out of concern

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[6] *See, e.g., Elliott v. Swartwout,* 35 U.S. (10 Pet.) 137, 153 (1836); *see generally* Reed, *supra* note 4, at 48-55. Because early customs procedure allowed the importer the option of securing the payment of duties by bond, many early customs suits also arose with United States as plaintiff seeking to recover duties on the bond. *See, e.g., United States v. Kid,* 8 U.S. (4 Cranch) 1 (1807); *see generally* Reed, *supra,* at 45-47 (identifying *Kid* as the first customs case to reach the Supreme Court).

[7] The first removal jurisdiction was temporary. Reed, *supra* note 4, at 50-52. In 1833, Congress permanently extended the jurisdiction of federal circuit courts to "all cases, in law or equity, arising under the revenue laws of the United States," and authorized removal "where suit or prosecution shall be commenced in a court of any state, against any officer of the United States, . . . for or on account of any act done under the revenue laws of the United States." Act of Mar. 2, 1833, ch. 57, §§ 2 & 3, 4 Stat. 632-33.

[8] *See, e.g., In re Two Hundred Chests of Tea,* 22 U.S. (9 Wheat.) 430 (1824) (rejecting Customs' interpretation of ambiguous term).

[9] *See* Reed, *supra* note 4, at 70-71 (noting that tariff cases were being filed in the Southern District of New York at three times the rate they were being decided).

[10] *See* Reed, *supra* note 4, at 71-72.

[11] *See* Act of June 10, 1890, ch. 407, 26 Stat. 131.

[12] *See* Act of Aug. 5, 1909, ch. 6, § 29, 36 Stat. 11, 105-06. *See* Reed, *supra* note 4, at 86-87 (quoting Felix Frankfurter and James M. Landis, *Business of the Supreme Court: A Study in the Federal Judicial System* 149-51 (1928)).

[13] As the Board of General Appraisers took on more judicial attributes, it was renamed the Customs Court and its members became the Justices (later redesignated as "Judges") of that court. *See* Act of May 28, 1926, ch. 411, 44 Stat. 669; Act of June 17, 1930, ch. 497, § 518, 46 Stat. 590, 737. In 1928, Congress assigned the Court of Customs Appeals jurisdiction over appeals from the Patent Office, renaming it the Court of Customs and Patent Appeals. *See* Act of Mar. 2, 1929, ch. 488, 45 Stat. 1475. In the 1950s, Congress redesignated both courts as Article III courts. Act of July 14, 1956, Pub. L. No. 84-703, § 1, 70 Stat. 532; Act of July 25, 1958, Pub. L. No. 85-755, § 1, 72 Stat. 848. *See generally* Reed, *supra* note 4, at 110-11, 118-23; Edward D. Re, *Litigation Before the United States Court of International Trade,* in 19 U.S.C.A. §§ 1-1550 at XXV, XXVI (West 1999).

that too many cases relating to imports were being heard in the district courts.[14] But throughout the changes in nomenclature, meaningful judicial review of customs decisions has been preserved, and indeed strengthened, since the founding of the Republic. For over a century, Congress has vested responsibility for that review in highly specialized courts intended to be expert in customs law.[15]

C. Tariff Classification Decisions

All "goods" imported into the customs territory of the United States are subject to the terms of the Harmonized Tariff Schedule of the United States ("HTSUS").[16] The HTSUS is a comprehensive system of categorizing all products found in international commerce and prescribing a tariff rate for them. The HTSUS consists of: the General Notes; the General Rules of Interpretation; the Additional U.S. Rules of Interpretation, the Chemical appendix; and product categories set forth in twenty-two sections, designated by 4-digit, 6-digit, or 8-digit code numbers. An extraordinarily detailed statute, the HTSUS contains some nine thousand

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[14] Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727. *See generally* Reed, *supra* note 4, at 166-69. When the United States Court of Appeals for the Federal Circuit was created in 1982, it was given exclusive jurisdiction over Court of International Trade appeals. *See* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25.

[15] *See, e.g.*, H.R. Rep. No. 96-466, at 3 (1979) ("The United States Court of International Trade would continue to be equipped with the same *expertise and specialized skills* that the United States Customs Court has acquired through the years.") (emphasis added).

[16] Section 1217 of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988), *codified at* 19 U.S.C. § 1202.

product categories, which are termed Headings and Subheadings.[17]

D. How Classification Decisions Are Rendered

A tariff classification decision represents an application of law—the tariff schedules and related regulations—to a unique set of facts. Although it involves some degree of statutory construction, the classification decision is not purely an interpretation of law. Nor is a classification decision a policy judgment of general import. Rather, it is a fact-bound determination that particular goods, of particular specification and composition, are subject to tax under a particular Heading or Subheading of the HTSUS. In determining the duties assessed on a specific import transaction, Customs applies statutory (and in some cases regulatory) provisions to *the particular goods* involved.

Customs makes tariff classification decisions in two different contexts: in connection with the entry of goods into the United States, and in response to requests for prospective "rulings" in advance of importation.

1. *Classification Decisions On Liquidation*: Customs collects duties on imported goods at the time they enter the United States. The importer deposits estimated duties with the Customs Service at entry. Customs later determines the actual duties owed on the entry in "liquidation," a customs law term of art referring to the "final computation or ascertainment of the duties or drawback accruing on an entry."[18] At liquidation, Customs appraises the merchandise, and as-

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[17] *See generally* 1 Peter Buck Feller, *U.S. Customs and International Trade Guide* § 6.02 (1999) (describing organization of the HTSUS).

[18] 19 C.F.R. § 159.1; *see also* 19 U.S.C. § 1500; 19 C.F.R. § 159.6 (explaining procedures on liquidation).

certains the classification and rate of duty. A liquidation is the government's final accounting with the importer as to the taxes owed, and is "final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section . . . ."[19] An aggrieved importer may file an administrative protest within ninety days of the notice of liquidation, and if Customs decides to deny the protest, its decision is subject to judicial review in the Court of International Trade.[20]

2. *Classification Rulings*: Importers also have the option of obtaining a ruling on the classification of goods prior to their importation. The importer submits to Customs a sample or a detailed description of the merchandise, and receives from Customs a binding "ruling letter" setting out the agency's decision on classification.[21] The importer then attaches the ruling letter to the documents filed upon entry of merchandise, ensuring that Customs will liquidate the entry consistent with the ruling it has already made.[22]

E. Customs' Handling Of Ruling Requests

Importers may request Customs rulings as to classification, as well as a number of other matters. A Customs ruling "interprets and applies the provisions of the Customs and related laws to a specific set of facts."[23] Thus, Customs rulings are not available to interpret the tariff schedules in the abstract or to address hypothetical questions; rather, a ruling

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19 19 U.S.C. § 1514(a).

20 19 U.S.C. § 1514(c); 28 U.S.C. § 1581(a).

21 19 C.F.R. §§ 177.2; 177.1(d); 177.8.

22 19 C.F.R. § 177.8(a)(2).

23 19 C.F.R. § 177.1(d)(1).

must relate to "a specifically described Customs transaction."[24]

An importer has the option to address a request for a classification ruling to many different places—either to the Director, National Commodity Specialist Division, in New York, or "to any service port of the U.S. Customs Service."[25] Customs operates forty-five such "service ports," from Anchorage to Miami, which offer "a full range of cargo processing functions."[26] The importer submits information to the appropriate office at Customs, and Customs issues a decision.[27] Thus, ordinary rulings are issued without any notice to, or opportunity for comment by, anyone other than the person requesting the ruling.[28]

F. Judicial Review Of Classification Determinations

Judicial review of Customs classification decisions, whether made in connection with liquidation or in

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24 19 C.F.R. § 177.8(a)(1); *see* 19 C.F.R. § 177.7 ("no ruling letter will be issued with regard to transactions or questions which are essentially hypothetical in nature . . . .").

25 19 C.F.R. § 177.2(a).

26 19 C.F.R. §§ 101.1 (definition of service port), 101.3(b)(2) (list of service ports).

27 19 C.F.R. § 177.2(b) (specifying form and content of ruling request).

28 Customs also issues a limited number of decisions of general applicability, published with notice and an opportunity for comment, which have the effect of changing a practice or position of the Customs Service. 19 C.F.R. § 177.10(c). Confusingly, these decisions are also designated "rulings," the same term used for the case-specific decisions. The court of appeals here reserved decision as to whether such general-applicability "rulings," adopted after notice-and-comment, are entitled to deference. *See Mead Corp. v. United States*, 185 F.3d 1304, 1307 n.1 (Fed. Cir. 1999).

connection with rulings, takes place in the Court of International Trade. That court has exclusive jurisdiction to review the denial of a protest of a liquidation, as well as to review Customs rulings made prior to importation.[29]

In reviewing the denial of a protest, the Court of International Trade makes its "determinations upon the basis of the record made before the court"—a standard understood as *de novo* review.[30] The court reviews Customs rulings under the familiar standards of the Administrative Procedure Act (APA), setting aside any Customs decision it determines to be, *inter alia*, "arbitrary, capricious, an abuse of discretion, or otherwise contrary to law."[31] As a practical matter, since the ultimate question of the proper classification of goods is a question of law reviewed *de novo*, the standard is the same for the review of protest denials as for the review of rulings.[32] This is logical, since the only difference between a classification decision made at liquidation and one made in a

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[29] 28 U.S.C. § 1581(a) (protests); *id.* § 1581(h) (rulings).

[30] 28 U.S.C. § 2640(a); *see* Reed, *supra* note 4, at 256-61 (noting that Customs law "is one of the rare areas of administrative law in which de novo review is important.").

[31] *See* 28 U.S.C. § 2640(e) (incorporating standard of review of 5 U.S.C. § 706). Consistent with the limited, fact-specific applicability of rulings, an action challenging a ruling may only be commenced "by the person who would have standing to bring a civil action under section 1581(a) of this title if he imported the goods involved and filed a protest which was denied . . . ." 28 U.S.C. § 2631(h).

[32] *See* Reed, *supra* note 4, at 255 ("The APA instructs reviewing courts to select among the same standards defined under the specific statutory rights of action in the CIT: as appropriate, either de novo review, the 'arbitrary, capricious' test, or the 'substantial evidence test.'").

ruling is timing—whether the decision is made before or after importation of the merchandise.[33]

SUMMARY OF THE ARGUMENT

In seeking *Chevron* deference for the Customs Service's classification decisions, the government seeks to overturn two centuries of precedent under which both the factual and legal aspects of such determinations are reviewed *de novo*, without deference to Customs.

Customs classification decisions are case-specific applications of law to fact, not the pure questions of statutory construction and policymaking contemplated by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Furthermore, *Chevron* deference presumes that Congress intended that any gaps or ambiguities it left in a statute should be filled by the expert agency charged with administering it. This presumption breaks down in the face of the statutory scheme of customs law, in which Congress charged a highly specialized court of expert judges with reviewing *de novo* the agency's application of an exceptionally detailed statute to particular goods. *Chevron* deference does not logically extend to such classification decisions, and would be inconsistent with the Court's precedent, which for

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[33] The government erroneously argued in the court of appeals that judicial review of Customs decisions takes place pursuant to the APA. *See* Suppl. Post-Arg. Br. of Appellee at 7-9. The APA only applies to "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Here, because 28 U.S.C. § 1581 specifically provides a mechanism for judicial review, that statute, rather than the APA, governs review. Although section 1581(h) incorporates the APA's standard, this case was actually brought to review the denial of a protest, and the basis of jurisdiction was section 1581(a), under which review is *de novo*. 28 U.S.C. § 2640(a).

200 years has given no deference to the government's classification of goods under the tariff laws.

Nor is there any justification for distinguishing classification decisions made on rulings from those made at liquidation. Both types of decisions are equally narrow and fact-specific, limited to the particular merchandise under review. Any attempt to give greater deference to rulings than to decisions on liquidation would discourage importers from using the ruling request process, contrary to the intent of Congress.

Likewise, there is no basis for giving deference to Customs' rulings generally. A rulings is limited to the particular transaction under review and to the party that requested the ruling. Rulings are issued by many offices within Customs, in large volume, with no notice or opportunity for public comment.

ARGUMENT

I. ORDINARY CLASSIFICATION DECISIONS ARE NOT ENTITLED TO *CHEVRON* DEFERENCE

The government's argument that all classification decisions, wherever and however they are made, are subject to *Chevron* deference, is unsupported by *Chevron* and contrary to two centuries of precedent that does not accord such deference.

A. *Chevron* Does Not Justify Deference To Customs Classification Decisions

Chevron requires a court reviewing an agency's construction of the statute that it administers to consider whether Congress "has directly spoken to the precise question at issue." 467 U.S. at 842. If the statute is "silent or ambiguous with respect to the specific issue," the agency's interpretation must be upheld so long as it is a "permissible" or "reasonable" construction of the statute. *Id.* at 843-44. Such deference derives from the fact that the power of an agency to administer a program "necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Id.* So long as the agency has made "a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute," its policy choice should not be disturbed. *Id.* at 845. *Chevron* is inapplicable here because a tariff classification is a highly particularized, mixed question of fact and law, subject to *de novo* judicial review, not a policy choice that has been delegated to Customs.

1. A classification decision, unlike the regulations given deference in *Chevron* and in *United States v. Haggar Apparel Co.*, 526 U.S. 386 (1999), does not merely construe a statute. Rather, it involves both the legal issues of the scope and meaning of the tariff provisions *and* the factual issues of what the subject merchandise is. The ultimate question in tariff classification resembles what the Court in other contexts has characterized as a mixed question of law and fact, "involving as it does the application of a legal standard to a particular set of facts."[34] Courts generally review such mixed questions *de novo*.[35]

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[34] *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 450 ('1976) (materiality of facts omitted from a corporate proxy statement is a mixed question of fact and law"); *see Thompson v. Keohane*, 516 U.S. 99, 112 (1995) (ultimate question of "in custody" for purposes of *Miranda* warnings is a mixed question that "calls for the application of the controlling legal standard to the historical facts"); *Bose Corp. v. Consumers Union*, 466 U.S. 485, 501 & n.17 (1984) ("actual malice" in a defamation suit is a mixed question; "A finding of fact in some cases is inseparable from the principles through which it was deduced."); *Pullman-Standard v. Swint*, 456 U.S. 277, 289 n.19 (1982) (discriminatory intent is a mixed question); *see also Bausch & Lomb, Inc. v. United States*, 957 F. Supp. 281, 284-85 (Ct. Int'l Trade 1997) (relying on *TSC v. Northway*, *Thompson v.*

(Footnote cont'd on next page)

Although a degree of statutory construction may be involved, a classification decision is a highly specific, fact-bound determination that does not possess the "authoritativeness" or "deliberateness" required for *Chevron* deference.[36] In classifying merchandise, whether on liquidation of an entry or in a pre-importation ruling, Customs does not lay out a legal interpretation of the HTSUS separate from the factual aspects of the case before it.[37] Instead, it applies the criteria of the tariff schedule to the specific merchandise it reviews. *Chevron* deference to an administrative decision on a mixed question of law and fact, such as tariff classification, simply is not appropriate.

(Footnote cont'd from previous page.)

Keohane, and *Pullman-Standard*, to hold that the ultimate issue of tariff classification is a mixed question of law and fact "because it involves the application of a legal standard, *i.e.*, a tariff subheading, to a particular set of facts, *i.e.*, the item properly described"), *aff'd* 148 F.3d 1363 (Fed. Cir. 1998).

[35] *See Bose Corp.*, 466 U.S. at 501 (the "clearly erroneous" standard accorded findings of fact under Fed. R. Civ. P. 52(a) "does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact.").

[36] *See Smiley v. Citibank*, 517 U.S. 735, 741, 743 (1996) (an "opinion letter" of the Office of the Comptroller of the Currency, unlike a "full-dress regulation, issued by the Comptroller himself and adopted pursuant to the notice-and-comment procedures of" the APA, did not establish "a binding agency policy" because "it only purported to represent the position of the Deputy Chief Counsel in response to an inquiry concerning *particular* banks.") (emphasis added).

[37] As explained at 7-8, *supra*, liquidation is the "final computation or ascertainment of the duties or drawback accruing on an entry." 19 C.F.R. § 159.1

Far from reflecting an agency's "continuing responsibilities and policy-implementing perspectives," to which the government claims deference is due, tariff classification decisions are actually more akin to the "sporadic and case-specific . . . encounters with issues of statutory meaning" to which the government likens judicial involvement with administrative law. Gov't Br. 25 n.11. *Chevron* deference does not apply to this situation.

2. The statutory scheme of customs law, which includes judicial review by specialized courts, indicates that Congress could not have intended the sort of deference contemplated by *Chevron*. The decisions of most agencies are reviewed by non-expert judges sitting on courts of general jurisdiction. But for over 100 years, issues of customs law have been heard by specialized courts with great expertise. Thus, one rationale the government advances for deference—the assumption that an agency has greater expertise than its reviewing court, *see* Gov't Br. 25 n.11—does not apply to the Customs Service in the way it does to other agencies.

The Court of International Trade is in daily contact with customs law. With no jurisdiction over criminal matters or suits between private parties, the Court of International Trade deals exclusively with Title 19 of the U.S. Code, containing the customs law. The expert judges of that court are at least as qualified to construe the complex tariff provisions as are the Customs personnel who make classification decisions.

Congress' creation of the Court of International Trade and its predecessors, with jurisdiction to review *de novo* the factual as well as legal issues in classification decisions, indicates that Congress intended searching judicial review that would be inconsistent with broad deference to the views of the Customs Service. *Chevron* deference is based on

> a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency,

> understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.

Smiley, 517 U.S. at 740-41. The "presumption" on which *Chevron* is based fails in the case of customs classification decisions. There would be little point in having a specialized court to hear tariff classification and other customs law disputes if that court were merely required to defer to the decisions of the Customs Service. Thus, the establishment of the Court of International Trade indicates that Congress could not have intended deference to classification decisions.

3. *Chevron* deference to classification decisions would be inconsistent with the *de novo* review such decisions receive in the Court of International Trade. Congress has provided that the Court of International Trade "shall make its determinations upon the basis of the record made before the court," and that if it "is unable to determine the *correct* decision on the basis of the evidence presented," it may order retrial, rehearing, or further administrative or adjudicative procedures "as the court considers necessary to enable it to reach the *correct* decision." 28 U.S.C. §§ 2640(a), 2643(b) (emphasis added). In *Haggar*, the Court explained that *de novo* review was consistent with deference to agency *regulations*, which "establish legal norms" that are applied to the facts of a specific case: "Deference can be given to the regulations without impairing the authority of the court to make factual determinations, and to apply those determinations to the law, *de novo*." 526 U.S. at 391. But unlike regulations, a classification decision does not "establish legal norms"—on the contrary, it determines the ultimate issue in the case. The Court of International Trade would not be able to "make factual determinations and apply them to the law, *de novo*," if it were required to give deference to the Customs Service's

application of facts to law. Logically, *Chevron* cannot apply in this situation.

4. The structure of the HTSUS, and the highly particularized nature of classification decisions, is also inconsistent with giving *Chevron* deference to those decisions. Deference under *Chevron* is due when "the court determines that Congress has not directly addressed *the precise question* at issue." 467 U.S. at 843 (emphasis added). In the arena of classification, Congress of course has never literally addressed "the precise question at issue," because "the precise question" is which tariff classification applies to *specific* merchandise. The HTSUS contains both narrow categories and broader, catch-all provisions; thus, there may be several possible classifications available for a product. If Customs were required merely to choose any "reasonable" classification, it would be able to select the highest duty arguably applicable. The fact-specific nature of classification decisions would effectively insulate them from judicial review if they were given *Chevron* deference; deference would mean that *every* Customs classification decision would have to be upheld unless it was completely unreasonable.

B. Deference To Classification Decisions Would Be Inconsistent With Settled Precedent

Throughout the 200-year history of customs law, the Court has never given classification decisions anything resembling the deference accorded an agency's pure statutory construction under *Chevron*.

1. The Court's precedent of the past two centuries shows no particular deference to decisions of the Customs Service. Although deference to an agency's interpretation of a statute was recognized even early in the nineteenth century, *see Edwards' Lessee v. Darby*, 25 U.S. (12 Wheat.) 206, 210 (1827), the Court did *not* apply such deference to the classification decisions of customs collectors.

One of the earlier classification cases, *In re Two Hundred Chests of Tea*, 22 U.S. (9 Wheat.) 430 (1824), concerned the meaning of the term "bohea tea" in the tariff statutes. Customs officials interpreted the term as describing the historical or scientific classification of tea, a seemingly reasonable interpretation of an ambiguous term. *Id.* at 438. But Justice Story rejected the government's reading of the statutory provision, holding that the term "bohea tea" must be interpreted according to its ordinary commercial usage, not the meaning the government sought to give it. *Id.* at 438-39. The Court reversed the customs officials' interpretation, with no hint of deference.

Similarly, customs officials in *Curtis v. Martin* had classified "gunny cloths," used for bagging cotton, as "cotton bagging," which was subject to duty. 44 U.S. (3 How.) 106, 109 (1845). The government argued that the ambiguous term "cotton bagging" in the tariff schedule applied to "all articles used for bagging cotton." *Id.* Chief Justice Taney rejected the government's interpretation, holding that because gunny cloths were not used for bagging cotton at the time the tariff statute had been enacted, Congress could not have intended to tax them as such.

Likewise, in *Merritt v. Welsh*, the Court overturned Customs' classification of sugar according to its quality. 104 U.S. 694 (Oct. Term 1881). Relying upon "treasury instructions," customs officials had attempted to measure the quality of the sugar according to its "saccharine strength as ascertained by chemical tests," rather than purely by its color, as provided in the tariff schedules. *Id.* at 700. The Court flatly rejected the notion that Customs was entitled to recognize the improvements in sugar manufacture and techniques for measuring its quality, and interpret the statute to effect what it considered to be its purpose: "If Congress, as it has done, adopt the color standard, it is not for the Customs department to adopt a different one." *Id.* at 701. Far from deferring to the expertise of Customs, the Court said: "Discretion in the custom-house officer should be limited as strictly as possible. It has been said with much truth, 'Where law ends, tyranny begins.' " *Id.* at 702.

In these and other cases, the Court has not hesitated to interpret and apply the tariff statutes without deference to the views of the Customs Service.[38]

2. The government relies on *United States v. Vowell*, 9 U.S. (5 Cranch) 368 (1809), for the proposition that decisions affording "broad deference to the views of the federal officials who administer tariff legislation date to the very beginning of the customs laws." Gov't Br. 20. However, on careful reading, the case actually demonstrates the opposite.

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[38] In a number of other cases, the Court has given no deference to the government's classification determination. *See, e.g., Goat & Sheepskin Import Co. v. United States*, 206 U.S. 194 (1907) (rejecting government's application of ambiguous term "wool" in the tariff schedules to a substance found on sheepskin, but known in the trade as "Mocha hair"); *American Net & Twine Co. v. Worthington*, 141 U.S. 468 (1891) (rejecting government's application of ambiguous term "flax or linen thread" in tariff schedule to a thread made of linen but used as "gilling twine," another tariff term); *Arthur v. Stephani*, 96 U.S. 125 (Oct. Term 1877) (government erred in classifying chocolate "presented in a form in which it was ordinarily sold as confectionery" as "confectionery" rather than "chocolate"); *Arthur v. Zimmerman*, 96 U.S. 124 (Oct. Term 1877) (government erred in classifying "hat braids" under general tariff provision for "cotton braids, insertings, lace trimmings, or bobbinets"); *Arthur v. Morrison*, 96 U.S. 108 (Oct. Term 1877) (rejecting government's application of tariff term "silk veils" to veils made of silk but commercially known as "crape veils"); *Elliott v. Swartwout*, 35 U.S. (10 Pet.) 137, 150-53 (1836) (rejecting government's application of ambiguous statutory term "manufactures of wool," which the Court termed "obscure, and not susceptible of an interpretation entirely satisfactory," to "worsted shawls with cotton borders and worsted suspenders with cotton ends or straps").

The issue in *Vowell* was not classification, but rather the time when goods are deemed to be imported into the United States. In late December 1807, a cargo of salt came to anchor within the "collection district," but sixteen miles south of the actual "port" of Alexandria, Virginia. The tariff on salt expired on December 31, 1807, and the vessel was not brought to port until January 1, 1808. Nevertheless, customs officials demanded payment of the tariff, arguing that the duty attached when the salt arrived within the district. The Court did not defer to the government's interpretation of the meaning of the statutory phrase "imported into the United States." Rather, it rejected the government's position as inconsistent with the way it had treated arrival at port in situations where the tariff had *increased* rather than decreased. Chief Justice Marshall's statement, that "if the question had been doubtful the court would have respected the uniform construction which it is understood has been given by the treasury department of the United States upon similar questions," does not reflect deference, but rather the opposite—a determination not to allow the government to maximize revenues by taking inconsistent positions:

> It is understood that in case of an increase of duty, the United States have always demanded and received the additional duty if the goods have not arrived at the *port of entry* before the time fixed for the commencement of such additional duty, although the vessel may have arrived within the collection district before that time. The same rule of construction is to be observed when there is a diminution of duty.

9 U.S. (5 Cranch) at 372 (emphasis added). If anything, *Vowell* demonstrates that even 200 years ago, customs officials had a propensity to take inconsistent positions so as to maximize revenues. *Vowell* thus demonstrates the need for careful judicial review of Customs' activities, and the danger

in giving "deference" to Customs' application of the tariff provisions.

II. CLASSIFICATION DECISIONS MADE IN PRE-IMPORTATION RULINGS SHOULD RECEIVE NO MORE DEFERENCE THAN THOSE MADE AT LIQUIDATION

The defects in the government's argument that classification decisions are entitled to *Chevron* deference cannot be overcome by limiting such deference to classification decisions made in pre-importation "rulings" rather than those made at liquidation. According deference to classification decisions made upon ruling requests, but not to those made at liquidation, would be inconsistent with the relationship between rulings and liquidations, and inconsistent with the purpose of the ruling mechanism.

A. There Is No More Basis For Giving Deference To Classification Rulings Than For Giving Deference To Other Customs Classification Decisions

Classification decisions made in pre-importation rulings are just as fact-bound and case-specific as those made in liquidation; the only difference is timing.[39] Thus, rulings on tariff classifications should be given no more deference than classification decisions made at liquidation.

Nothing in the nature of rulings indicates that they are entitled to any greater weight than decisions in liquidation.

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[39] The case-specific nature of rulings, and their equivalence to decisions made on liquidation, is borne out by the fact that judicial review of rulings is available only if the party commencing the civil action "would be irreparably harmed unless given an opportunity to obtain judicial review prior to" importation. 28 U.S.C. § 1581(h). Otherwise, the party must import the goods, pay the tax, and seek judicial review upon denial of its protest. *Id.*

The regulations specifically provide that a tariff classification ruling "will be applied only with respect to transactions involving articles *identical* to the sample submitted with the ruling request or to articles whose description is *identical* to the description set forth in the ruling letter." 19 C.F.R. § 177.9(b)(2) (emphasis added). A ruling letter "represents the official position of the Customs Service *with respect to the particular transaction or issue described therein*," is "binding" on Customs and the individual importer "until modified or revoked," and "may be cited as authority in the disposition of transactions involving the *same* circumstances." 19 C.F.R. § 177.9(a) (emphasis added). The regulations specifically caution that "no other person should rely on the ruling letter or assume that the principles of that ruling will be applied in connection with any transaction other than the one described in the letter." 19 C.F.R. § 177.9(c). Classification rulings are just as narrow, limited, and fact-specific as the classification decisions made at the time of importation. There is no basis for giving them any greater deference.

B. Giving Deference To Rulings Would Discourage Their Use

Giving greater deference to classification decisions on ruling requests than that given to classification decisions on liquidation would discourage importers from using ruling requests. Such a result is contrary to Congressional intent, which has been to encourage the use of ruling requests.

Customs rulings help the international trade community make effective business decisions by allowing them to ascertain in advance what duties will be owed on merchandise. For example, an advance classification ruling can have an important bearing on the price an importer negotiates with a foreign producer, on the importer's resale price, or on the

acquisition of a foreign manufacturing facility to supply the U.S. market.[40]

Congress has also encouraged importers to use the rulings request process. Current customs law provides that importers may be liable for civil penalties for failing to exercise "reasonable care" in declaring the value, classification, and rate of duty on imported merchandise.[41] Congress specifically intended that importers seek rulings as a means of exercising "reasonable care":

> In meeting the "reasonable care" standard, the Committee believes that an importer must consider utilization of one or more of the following aids to proper compliance: seeking guidance from the Customs Service through the pre-importation or formal ruling program . . . . If the above steps are taken, the importer will be presumed to have acted with "reasonable care" in making entry.[42]

But if rulings are given greater deference than decisions made upon liquidation, an adverse decision from Customs in

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[40] *See* 1 Peter Buck Feller, *U.S. Customs and International Trade Guide* § 4.01 (1999); *see also* U.S. General Accounting Office, *Office of Regulations and Rulings Has Yet to Establish Performance Measures* 2 (1997) (noting that "representatives from the trade community we interviewed" reported that "rulings provided important analyses and information about the duties they should expect to pay on the goods they import," and that they were "crucial to their ability to make effective business decisions and comply with Customs' regulations.").

[41] 19 U.S.C. § 1484(a)(1) ("importer of record . . . shall, using reasonable care . . . complete the entry by filing with the Customs Service the declared value, classification and rate of duty applicable to the merchandise.")

[42] H.R. Rep. No. 103-361, pt. 1, at 120 (1993), *reprinted in* 1993 U.S.C.C.A.N. 2552, 2670.

a ruling would be more difficult to overturn on judicial review than the same decision reached through protest of the liquidation of an entry. Such a situation would discourage importers from seeking rulings, contrary to the Congressional intent to encourage the use of rulings. Importers would be in the untenable position of having to choose whether to risk penalties by not seeking a ruling, or to seek a ruling which may be more difficult to overturn on review.

III. THERE IS NO BASIS FOR GIVING *CHEVRON* DEFERENCE TO CUSTOMS RULINGS

Customs rulings are different from the formal agency pronouncements to which *Chevron* deference has been given. Extending *Chevron* deference to embrace Customs Service rulings would be inconsistent with the nature of rulings and contrary to the scheme of customs law.

A. Customs Rulings Have A Different Character From The Agency Actions To Which The Court Has Given *Chevron* Deference

The government rather grandly portrays Customs' routine issuance of ruling letters in response to specific requests as "the formal adoption and issuance of binding interpretive rulings." Gov't Br. 29. But in fact, ruling letters are at the opposite end of the spectrum from the "full-dress regulations" to which *Chevron* deference is owed. *Cf. Smiley v. Citibank*, 577 U.S. at 741.

1. Ruling letters are not agency pronouncements of general applicability, but rather are narrow, fact-bound decisions, of no precedential value, and intended only for the use of the person to whom they are directed. A ruling is defined as "a written statement" that "interprets and applies the provisions of the Customs and related laws *to a specific set of facts*." 19 C.F.R. § 177.1(d)(1) (emphasis added). A Customs ruling may be sought only for "a specifically described

Customs transaction." 19 C.F.R. § 177.8(a)(1). Indeed, far from offering general guidance, "no ruling letter will be issued with regard to transactions or questions which are essentially hypothetical in nature . . . ." 19 C.F.R. § 177.7(a).

The government correctly points out that rulings represent "the official position of the Customs Service with respect to the *particular transaction or issue* described therein," that they "may be cited as authority in the disposition of transactions involving *the same circumstances*," and that they therefore are "binding" on Customs personnel and applicable to "all entries which are unliquidated" at the date of issuance. 19 C.F.R. § 177.9(a) (emphasis added). But unlike formal regulations or other agency pronouncements of general applicability, ruling letters are *not* precedential as to *other* transactions.[43] Rather, consistent with their non-precedential character, rulings are subject to "modification or revocation without notice to any person, except the person to whom the letter was addressed." 19 C.F.R. § 177.9(c). "Accordingly," warns Customs, "no other person should rely on the ruling letter or assume that the principles of that ruling will be applied in connection with any transaction other than the one described in the letter." *Id.* Such limited, case-specific decisions on particular transactions are not the sort

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43 "The applicable regulations . . . are not a model of clarity. It is apparent, however, from the language of 19 C.F.R. § 177.9, that ruling letters are not issued by the Customs Service with the expectation that they can generally be relied upon. Rather, they are intended to apply to a specific set of circumstances." *Superior Wire v. United States*, 867 F.2d 1409, 1413 (Fed. Cir. 1989).

of general statements of official agency policy to which *Chevron* deference might be owed.[44]

2. Ruling letters are issued by a number of different offices within Customs. In addition to the National Commodity Specialist Division in New York, forty-five different service ports are authorized to issue rulings.[45] Requests for valuation and carrier rulings are sent to the Office of Regulations and Rulings at Customs Headquarters in Washington.[46] It would be illogical to give deference to rulings from *all* of those offices. The decentralized nature of the ruling process demonstrates that rulings are not the settled or official position of the head of the agency, and not the sort of definitive pronouncements entitled to *Chevron* deference.

3. Ruling letters are not subject to the notice-and-comment procedure of the APA.[47] The absence of an opportunity for public comment is understandable, given the vast quantities of ruling letters issued: The government advises that Customs Headquarters alone issues over 1000 rulings per year. Gov't Br. 38 n.26. In addition, the service ports issue even more rulings, which are not included in that figure. Decisions being churned out at the rate of three per day,

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[44] *Cf. Smiley*, 517 U.S. at 741; *United States v. Correll*, 389 U.S. 299, 302 (1967) (deference to general rule which avoided a "purely case-by-case approach" to tax law).

[45] 19 C.F.R. § 177.2(a) (procedures for classification rulings); § 101.3(b)(2) (list of service ports).

[46] 19 C.F.R. § 177.2(a).

[47] Only a limited number of decisions—those changing a practice—are required to be made after notice and comment. 19 C.F.R. § 177.10(c). Those decisions, which are also called "rulings," are *not* at issue here, and the court of appeals reserved judgment on them. *Mead Corp.*, 185 F.3d at 1307 n.1.

without benefit of the "notice-and-comment procedures of the Administrative Procedure Act designed to ensure due deliberation," cannot be regarded as having the "deliberateness" and "authoritativeness" of the agency positions to which the Court gives *Chevron* deference. *See Smiley*, 517 U.S. at 741.

B. There Is No Indication That Congress Intended Customs Rulings To Receive Deference

The government makes much of the statutory language authorizing Customs to issue "binding rulings," arguing that this language renders rulings "formal interpretations" in "the format authorized by Congress for this purpose." *See* Gov't Br. 15, 23, 29, 31 (citing 19 U.S.C. § 1502(a)). This argument overstates the significance of the term "binding."

The "binding rulings" language of Section 1502(a) was added in 1993.[48] The purpose of the amendment was to provide certainty to *importers*, not to give greater deference to Customs: "These amendments will provide greater certainty to *importers* through the binding rulings program while also permitting Customs to accelerate the entry process."[49] The term "binding" simply indicates that the importer may rely upon the ruling, and that Customs officials at all ports will be constrained to follow the ruling, as to *those particular goods*.

The reason for making the rulings "binding" is to permit the importer to rely on them and to prevent inconsistent decisions by officials in different ports. The statute does *not* make the rulings "binding" as to anyone other than the im-

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[48] Pub. L. No. 103-182, § 640, 107 Stat. 2057, 2203 (1993).

[49] H.R. Rep. No. 103-361, pt. 1, at 138, 1993 U.S.C.C.A.N. at 2688 (emphasis added).

porter who requested it. The rulings certainly are not binding upon the judiciary, and are not entitled to judicial deference.

IV. DEFERENCE IS INAPPROPRIATE IN THE MANY OTHER CONTEXTS IN WHICH CUSTOMS ISSUES RULINGS

In addition to rulings concerning tariff classifications, the context in which this case arises, Customs uses the same administrative mechanism to issue rulings on a number of other subjects—country of origin and country of origin marking, drawback, foreign trade zones, customs bonds, customs brokers, and other matters. Giving *Chevron* deference to classification rulings could suggest that deference should apply to rulings in *all* of these contexts, depriving importers of meaningful judicial review in circumstances far beyond this case.

One context in which deference would be particularly inappropriate is customs rulings interpreting judicial decisions. When Customs receives an adverse judicial decision, it may attempt to contain the effect of that decision by issuing what it terms a "limiting ruling":

> A published ruling may limit the application of a court decision to the specific article under litigation, or to an article of a specific class or kind of such merchandise, or to the particular circumstances or entries which were the subject of the litigation.

19 C.F.R. § 177.10(d). Although Congress has recognized that Customs may issue such rulings, *see* 19 U.S.C. § 1625(d), there is no indication that it believes they are entitled to any deference.

For the courts to give "deference" to a Customs Service interpretation the HTSUS which is designed to limit the application of a judicial decision would make no sense.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Federal Circuit.

Respectfully submitted,

PETER BUCK FELLER
Counsel of Record
DANIEL G. JARCHO
MICHAEL J. HAUNGS
MYRON PAUL BARLOW
MCKENNA & CUNEO, L.L.P.
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500

Counsel for Amicus Curiae
The American Association of
Exporters and Importers

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